their final adjournment, a proper person to fill said vacancy." A majority of the court reasoned that the constitution expressly authorized the governor to fill vacancies happening during the recess of the senate and did not expressly place any restriction on his choice in making such a temporary appointment. They refused to find that any such restriction was to be implied from the constitution. The minority judges dissented on the ground that the constitution by implication prevented the governor from appointing to office, for any portion of the term thereof, a person whom the senate had rejected for appointment to the same office for the full term. The majority opinion mentions but does not discuss the point as to when the vacancy occurred. There is slight authority to the effect that where a vacancy occurs before the adjournment of the senate, it is not a vacancy happening during the recess of the senate or, in other words, the office does not become vacant during the recess. *People* v. *Forquer* (1825), 1 Ill. 104. Other courts have taken the opposite and better view and held that though the vacancy first occurred during the session of the senate, it continues to exist or "happen" until filled, and the power of recess appointment therefore embraces the power to fill temporarily a vacancy which existed when the senate was in session and for some reason was not filled. *In re Farrow* (1860), 3 Fed. 112; *State* v. *Kuhl* (1889), 51 N. J. L. 191. It is therefore entirely probable that had this point been decided by the court in the instant case it would have been settled that the vacancy "happened" during the recess of the senate and the governor's power of appointment would have been upheld. On the main point discussed by the court in the instant case the majority of the court appear to have been right. The governor's power to nominate and, by and with the advice and consent of the senate, to appoint a person to fill an office for the full term is entirely separate and distinct from the governor's power of recess appointment. The mere fact that the two powers are conferred by the same section of the constitution furnished no reason for limiting one by the other. Nothing in the language of the section conferring these powers creates an implication that the governor's power of choice in making a recess appointment is limited by the senate's approval or disapproval of the person selected. As shown in the majority opinion in the instant case, the implication contended for by the minority judges is so doubtful that it has been found necessary to insert in many state constitutions express provisions to secure the same effect sought to be obtained by the implication contended for in this case. The power of the executive to appoint to office, during the recess of the senate, to fill a vacancy and serve until the end of the next session, a person who has been rejected for appointment to the same office for the regular term by the senate before its adjournment has been the subject of much speculation. This seems to be the first case in which the point is squarely decided.

SALES—RIGHT TO RESCIND FOR BREACH OF WARRANTY.—Action to rescind the sale of an auto truck for breach of warranty. *Held,* Appellee by using the truck a year, though intermittently complaining of defects, had waived his right to rescind. *International Harvester Co. of America* v. *Brown* (Ky. 1918), 206 S. W. 622.

In deciding that appellee had waived his right to rescind, the court necessarily assumes the right to have existed subsequent to the sale. By the weight of authority in this country and England, the rule on the right of a purchaser to rescind a sale on breach of warranty is as stated in *Thornton* v. *Wynn,* 12 Wheat. 184 and *Street* v. *Blay,* 2 B. & A. 456, wherein it was held that no such right existed in cases where title had passed to the vendee unless there had been fraud, or unless the right was given by breach of a condition subsequent. See 16 HARV. L. REV. 465, where the cases are collected and commented on by Professor Williston. Opposed to this is the case of *Bryant* v. *Ishberg,* 13 Gray 607, where the court came to the conclusion that * * * "a warranty may be treated as a condition subsequent at the election of the vendee, who may, upon a breach thereof rescind the contract and recover back the amount of his purchase money as in case of fraud." As to the status, strength and respective merit of the conflicting views in our courts, see a running discussion between Professors Williston and Burdick in 4 COL. L. REV. 2, 194, 265, wherein the former ably supports the Massachusetts rule and the latter strongly contends for the law of *Street* v. *Blay.* The instant case fails to state explicitly the court's conception of the stand taken by the Kentucky courts on the question. Inferentially it holds to the right to rescind. In the case of *Lightburn* v. *Cooper,* 1 Dana (31 Ky.) 273, the court decided that "a simple warranty and tender even though there has been a breach of the warranty, cannot operate as a rescission." No subsequent cases have been found overruling this case. Cases cited by the court in the instant case, where the right to return the goods was considered, contained provisions for rescission on breach of warranty. *Dick* v. *Clark Jr. Electric Co.,* 161 Ky. 622; *McCormick* v. *Arnold,* 116 Ky. 508, or for replacement of any and all defective parts, *Meek Coal Co.* v. *Whitcomb Co.,* 164 Ky. 833; or, as in *Yeiser et al.* v. *Russell & Co.,* 26 Ky. L. Rep. 1151, the breach went to a condition and was waived by retention of the goods. Unless, therefore, there was some provision in the contract of sale for returning the goods on breach of warranty omitted from the report of the case under discussion, the court's assumption that such right existed in Kentucky, was fallacious. Under the rule of *Lightburn* v. *Cooper,* the court would have arrived at the same conclusion on the ground that a mere breach of warranty and tender would not operate to revest the title in the seller, or if the matter be considered as breach of a condition, the acceptance and use beyond the time necessary for inspection would be deemed a waiver of the right to rescind and the vendee would be put to his action for damages for breach of warranty.

TRADE-MARKS—INDEPENDENT ORIGINATORS.—Complainant had built up, in Massachusetts and to a certain extent throughout the Union, a business which used the trade-mark "Rex" for medical preparations. Defendant, unaware of this, used the same word as a trade-mark for similar goods and had built up a local business in Kentucky. Complainant sued to restrain defendant from further use of the trade-mark "Rex" on the ground that it was an infringement. *Held,* the decree of the District Court should be reversed and an in-